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LAW REPORTING.*

ENGLISH REPORTS.—(*Contd.*)

In this Lecture I propose to deal with the history of Criminal Procedure in England which is an indispensable preliminary to a proper use of the Criminal Law Reports. In a way I have already touched upon some aspects of the question but it is desirable that the whole question should be considered at one place, and with certain amount of fulness.

The Assize of Clarendon, dated 1166, marks the beginning of the regular Criminal Procedure in England. It substituted for the old "hue and cry" a regular indictment or accusation before the King's Justices or Sheriff as the case may be by a Grand Jury of 12 men of the locality in cases of murder, theft and robbery. The Assize of Northampton added treation of the Court. Misdemeanors were mostly statutory offences. These two assizes marked off the graver class of offences called felonies from trespasses or misdemeanors as they came to be called later. Misdemeanor is described by Dr. Johnson as a kind of indefinite crime not capital but punishable at the discretion of the Court. Misdemeanors were mostly statutory offences At this stage, there was little that could be said to resemble a trial, the substantial part of the proceeding consisting mainly of the accusation by the Grand Jury. If the man was of bad fame, he was mutilated and set adrift without more and his chattels were forfeited to the Crown. The only sort of further trial allowed was the ordeal by water or fire. Even if the accused succeeded at the ordeal, he had to furnish security for good behaviour, if there was any flaw in his reputation. It is because the Grand Jury really took the place of witnesses that so much importance is attached in early procedure to venue about which we will speak at some length later. The procedure introduced by these assizes was the alternative for the

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direct method known as appeal for felony which, for a considerable time, occupied a very important place. The so-called appeal was only regulated vengeance and could hardly be called Criminal Procedure. A party who wanted to avail himself of this remedy had to present a minute and careful statement before the coroner accusing the offender and calling upon him to appear. If he failed to appear after five proclamations; he was outlawed. If he appeared and accepted the challenge, a battle would take place. If he was beaten, he was hanged straightaway; if he kept on fighting till the appearance of the stars, he was acquitted of the appeal. An acquittal, however, did not exempt him from prosecution by indictment. The advantage of appeal lay in this that in cases of larceny, the complainant could get restitution only by resorting to this method. On conviction on indictment the goods were forfeited to the Crown and the party was without remedy. This defect was set right by a Statute of 1529 which allowed restitution even in cases of conviction by indictment. The King's Judges generally encouraged indictment for two reasons, first because it was a source of revenue to the King as conviction involved forfeiture; secondly because it was a check on lawlessness which the other method involved. They accordingly suggested and allowed all sorts of technical loopholes for the accused proceeded against the other way. It was also laid down that the right of appeal was suspended during the visit of the King's Judges. Gradually, the procedure by appeal died out, the appeal for murder being the last to disappear. The three modes of trial known to English procedure at this time were waging law, battle and ordeal. By waging law is meant the getting a sufficient number of friends of the accused to swear to his innocence. This method was not available when the accused was caught red-handed or otherwise there was a *prima facie* case. Nor did it apply to cases of indictments. Battle went with appeal. Ordeal was the only mode of trial available in the case of indictments. This mode also disappeared when the Church abolished it in 1216. The Judges had recourse then, to the expedient of asking the accused whether he would submit to the trial by the country, *i. e.*, by the jury known later as Petty Jury to distinguish it from the other or Grand Jury. But till 1772 it was left to the option of the accused to agree to such a course. Sometimes they used to stand mute; the advantage of such a course being that their goods would not forfeit to the Crown. To mane them consent, judicial

torture used to be applied, such as starvation, pressing with weights, thumbscrew and so forth. In 1772 standing mute was declared by statute to be equivalent to conviction, but in 1827, it was enacted more in accordance with modern spirit that it amounted to a plea of not guilty. By the middle of the fourteenth century, trial by jury became an established feature of the English law. At this stage, accused were not allowed much liberty in their defence. They were not allowed even a copy of the indictment or a list of Crown's witnesses. They were not allowed to have counsel to defend them unless a point of law arose. It was doubtful if they could call witnesses and even if they could, the witnesses were not examined on oath. The argument used in support of this course was of the most curious kind—the prosecution was bound to prove the truth of the indictment. If it did not, the accused were entitled to an acquittal. If it did, it was no use to allow the accused to call witnesses. That would only be to encourage perjury. The only guarantee against reckless accusation and conviction for a long time was the approval of the Grand Jury, who were men of the locality. Even before them the accused were not permitted to cross-examine witnesses for the prosecution or summon their own witnesses in defence; a practice which continues to this day. A preliminary procedure of enquiry by justices was grafted upon the old procedure, but it was only the Act of 1848 that gave the accused the right to be present and to cross-examine witnesses at such enquiry. The right to call witnesses was conferred by the Act of 1867. By the same Act, to prevent groundless accusations, it was provided that an accused person can be arrested only on a sworn information or if he fails to attend on summons and provide for bail at the preliminary stage except in the case of heavy accusations, where a discretion is vested in the justices. One of the great abuses of early Criminal Procedure was the use of criminal information for the benefit of private plaintiffs. It was in law available only to the Crown in respect of its claims, but for adequate consideration one could have the use of it, as of many other things, by the connivance of officers of Courts. This was abolished by an Act of 1692. The first real reform of the abuse of illegal arrest and indeterminate-confinement which lay in the hands of King's Officers was effected by the passing of the Habeas Corpus Act of 1679. To start with, this writ was merely the incident of every criminal trial requiring the Sheriff

to produce the accused. In the 14th and 15th centuries it was used to protect the officials of Courts from arrest by rival Courts. A century later, it was used by the superior Courts to test the validity of imprisonment by their prerogative rivals or by executive authority generally. But the remedy resting as it did on several historical fictions was not felt adequate and in 1679 the statute above referred to was passed making it compulsory on the Judges of superior Courts to consider the application of every prisoner questioning the validity of his imprisonment.

Another private remedy capable of abuse was the right of preferring a bill of indictment before a Grand Jury possessed by every citizen at common law without any previous inquiry before justices into the truth of the accusation. Such accusations are known as voluntary bills. This right was not taken away by the Indictable Offences Act of 1848 which provided for preliminary inquiry before a justice in the case of ordinary indictments. The danger in them was that the Grand Jury heard only the prosecution and the accused was unrepresented before them.

Accordingly the legislature intervened and by the Vexatious Indictments Act of 1849 took away this right in many crimes, therein specified, such as perjury, indecent assault, libel, obtaining money by false pretences and several statutory misdemeanors. In all those cases now, a private party is not entitled to prefer a bill unless he has been bound over to prosecute or the accused is in custody or unless he has taken the consent in writing of one of the Judges of any of the superior Courts or of the Attorney-General or of the Solicitor-General. The first two contingencies can happen only on the party going before a justice. If the justice refuses to commit, the party may insist upon being allowed to go to the Grand Jury on his taking out a recognisance to give evidence or to prosecute.

Two other modes of initiating prosecution are the coroner's verdict which stands on the same footing as the finding of the Grand Jury though it is usual even in such cases to have a bill presented to the Grand Jury. Criminal information is occasionally resorted to in cases of misdemeanor before the King's Bench Division but it is available only to the Attorney-General or to the Master of the Crown's Office who is to be approached by private parties. Except in those petty cases governed by the summary jurisdiction Acts and the rare cases of information, all criminal trials in England are now preceded

by a twofold inquiry, one before the Justice of the Peace and another before the Grand Jury. A further safeguard against wrong conviction is provided by the unanimity of the jury which has been insisted upon from early times. This was of the greatest value to the accused when he had not the benefit of counsel or of the summoning of witnesses. All sorts of pressure used to be applied to secure unanimity among the jury. They were kept without food and fire till they came to an agreement. It was determined only in 1866 in the case of *Winson* v. *R.*, L. R. 1 Q. B. 289, that in any case of disagreement it was open to the Judge to discharge the jury and call a fresh jury. To secure strictly impartial men on the jury certain rights of challenge peremptorily and upon cause are allowed to the accused and the Crown. In the case of treason, the accused can challenge up to 35 without cause, in the case of felonies, up to 20. In the case of the Crown, the right is subject to there being enough people left to serve on the jury. On good cause, jurors can be challenged to any extent. Good cause is said to consist of 4 categories:

(*i*) *propter honoris respectum, i. e.,* on the ground that he is a peer.

(*ii*) *propter defectum, i. c.,* on the ground that he is a minor.

(*iii*) *propter offectum, i. e.,* on some presumed or actual partiality.

(*iv*) *propter delictum, i. e.,* on the ground of conviction for some crimes or misdemeanors affecting credit.

The challenge may be also for favour, *i. e.*, when there are reasonable grounds for suspicion that he will act under some prejudice or undue influence as when he has been entertained in the house of the party or is a fellow-servant, etc.

In 1695, a Treason Act was passed which provided that all persons prosecuted for treason should be provided with copies of the indictment five days, of the jury list two days before the trial, that they may be represented by counsel and may call witnesses who had to give evidence on oath. If the accused be too poor, it provided that the Court should assign two counsel of his own choice at public expense. It also provided that one might not be tried without the oath of at least two persons to support the specific kind of treason charged. This must be said to mark the beginning of civilised procedure in England. It was only in the reign of William IV that persons tried of felony were given the right to be defended by counsel.

It is a matter for comment that when this right was conferred on the accused, nearly all the Judges opposed the reform. In the case of misdemeanors, the accused had always the right to be defended by counsel. The Trials for Felonies Act (1836) gave the accused also the right to copies of depositions of witnesses, but it was only by the Indictments Act of 1915 that the accused became entitled to a copy of indictment in cases other than treason. In the case of murder and other grave crimes it was usual for the Court to ask some member of the bar present to give his honorary services to the prisoner. In 5 Cr. Ap. Reports 187, the Court of Criminal Appeal suggested that it might be done also in the case of rape and other offences of like nature. Now by the Poor Persons Defence Act (1903), 3 Ed. VII, c. 38, whenever it appears, having regard to the defence set up by any poor prisoner that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, the Committing Justices or the Judge of Assize or the Chairman of Quarter Sessions as the case may be, may certify that the prisoner ought to have legal aid and then the prisoner shall be entitled to legal aid at public expense. Under the rules made by the Attorney-General, every clerk of the Assize and clerk of the Peace keeps a list of solicitors and members of the Bar willing to undertake the defence of poor prisoners. The clerk is bound to enter in the list the names of all those that are willing. The name of any solicitor may be removed on the application of the solicitor or at the direction of any Judge of the Assize or the Chairman of the Quarter Sessions.

The indictment was originally an accusation presented by the Grand Jury upon their knowledge whereby some person was charged with crime. It is now drawn up by the solicitor for the prosecution. The bill is presented to the Grand Jury who hear witnesses for the prosecution, so many of them as they think necessary and if they are satisfied that a *prima facie* case is made out, they indorse upon the indictment the words 'true bill' '*billa vera*' as it used to be called in the days of bad Latin; if they are not so satisfied, they return a no true bill or *ignoramus*. Great strictness used to be observed in respect of these indictments and failure in respect of any formality used to lead to the defeating of the prosecution. This strictness was possibly a legacy from the 'appeal' procedure.

The history of indictments is a branch of the law of special pleading as applied to Criminal Law. The three parts of an

indictment are—the venue, the statement and the conclusion. The last has been rendered largely unnecessary by later legislation, but the other two parts remain important even to-day.

By venue is understood the local area over which the Commissioner or Judge has jurisdiction. The High Court has jurisdiction over offences wherever committed in England but the indictment is to be presented by the Grand Jury of the place and, before the Commissioners of Oyer and Terminer became a part of the High Court, the local jurisdiction of the Commission was limited to the area defined in the Commission. The Justice is commissioned to inquire with the assistance of the Grand Jury and to hear and to determine (Oyer and Terminer) with the assistance of the Petty jury and to have gaol delivery of prisoners under trial. In all these matters, the jurisdiction was determined by the terms of the Commission. This necessity to be presented by the Grand Jury of the place was carried so far that, in some instances, an accused went scot free. For instance, if a man was stabbed in one county and he died in another, the jury of neither place could present and the man could not be convicted of murder. Again, if a thief stole in one county and took the goods into another and the goods were received by somebody there, the receiver escaped as he could not be indicted in either county. The principal's county could not take cognizance of the receipt and the accessory's county could not take cognizance of the principal's offence. If the place was unknown, as, for instance, in the case of forgery, the accusation could not be presented at all. Special statutes were passed from time to time fixing the venue in such cases. To provide for the case of thieves travelling from place to place, the doctrine was invented that the theft continued so long the thief continued in possession of the goods. Where a fair trial could not be expected in the ordinary venue, the King's Bench had power to change the venue.

The statement portion was expected to set out all the ingredients of the offence, *viz.*, the material facts and circumstances and the intent that constitute the offence. These matters had to be set forth with certainty and without repugnancy and the accused must be directly and positively charged with having committed the offence. The name of the accused had to be given with his rank, occupation and residence, so also the name of the party injured and of the owner of the property stolen if known, if not known, that fact had to be noted. Every material fact which formed an ingredient in the offence had to be alleged

to have been done at a particular place and time. There are 3 degrees of certainty according to Coke: (1) certainty to a certain intent in every particular, (2) certainty to a certain extent in general, (3) certainty to a common intent. It is the second kind of intent that was required in respect of indictments: Statements had to be set out verbatim and chattels had to be described correctly. There were also certain customary ways in which certain things had to be described. If those descriptions were not given, the indictment failed. For instance, money had to be described as so many pieces of the current gold and so forth. If a man was charged with stealing sheep and it was proved that he stole dead sheep, the charge failed. Boot was the word and shoe could not be substituted for it. Averments had to be proved as laid. If a man was indicted for the murder of James Smith and it turned out that his name was John Smith, the prosecution would fail. In the case of murder, it was necessary to set out all minute details, *e. g.,* if a man was stabled, how he was stabled, where and when and so forth. If the indictment said that he was stabbed with the knife in the left hand and the evidence was that he was stabbed with the knife in the right hand the prosecution failed. Thus it became necessary to charge alternative counts in order to provide for every possible contingency. This led to interminable length in these indictments. In forgery the person defrauded had to be mentioned. Perjury, theft by false pretences and many other offences required very intricate indictments. In no one count was it allowed to charge for more than one offence, but the same indictment might contain any number of offences subject to this that a felony and a misdemeanor could not be combined. In the case of felonies, the Courts laid down early a rule of election, viz., that, if felonies in disconnected transactions were combined, the prosecutor should select one transaction to which he should confine his evidence. Misdemeanors were not subject to the rule of election. As I have said before the Court had no power to amend the indictment and any variance however trivial led to a defeating of the prosecution. In spite of the wide loophole provided thus, the accused laboured under great disability in that they were not able to get a copy of the indictment and whatever defect there was, they had to discover it while the indictment was being read out to them, and in this they had not till recently even the assistance of counsel. The Criminal Procedure Act of 1848, the Quarter Sessions Act, 1849, and the Criminal Procedure Act have, on the one hand, simplified indictments and on the other have conferred certain

powers on the Court to amend the indictments. By reason of its piecemeal nature and the very wide knowledge of the rules of pleading that it assumed, the reform was of very doubtful value. The subject is now governed by the Indictments Act, 1915, which confers on the Court very wide powers of amendment. By that Act, a rule committee is set up for making rules as to the framing of indictments. The subject has been simplified beyond recognition. You have an interesting discussion as to the survival in English Criminal Law of the old technicalities relating to repugnancy of record and its consequences in *I. G Singleton* v. *The King-Emperor* (1).

As to practice also, the Criminal Procedure Act of 1865 has assimilated the practice in criminal cases to that of civil in several particulars. But it was not till 1898 that the evidence of the accused and their husbands or wives became admissible in criminal cases. The accused and their husbands and wives cannot be called even under this Act except upon the application of the accused, and the fact that accused has not volunteered testimony may not be commented upon by the prosecution though apparently there is nothing to prevent the Court making the comment.

At common law, the Crown neither pays nor receives costs, and all provisions as to costs in criminal cases are statutory. There were some partial provisions in statutes, from time to time. Now a statute of 1908, 8 Ed VII, c. 15, deals comprehensively with the subject and provides for the costs of unsuccessful prosecution or defence. The cost is first paid out of public funds and then recovered from the party directed to pay. Under the Crown Office Rules, pauper procedure is made applicable to criminal proceedings as well.

The old English Law knew but one punishment, the capital for all major offences. The barbarity of these sentences was assuaged by a series of Acts connected with Peel (1827-1832) and the final touch was given by 7 William IV and 1 Vic., c. 1, which abolished death sentence in a large number of cases. Towards the end of the 17th century, the practice of transporting to colonies came into vogue, but this could at first be done only at the choice of the accused but power was given to the Judges by a statute of 1717 to pass a sentence of transportation in lieu of capital sentence. When the colonies were closed for transportation, penal sevitude was made to serve for transportation. Various improvements have been effected in accordance with modern development of scientific cri-

1. (1924) 29 C W N 260.

minology by the Children's Act (1908), Prevention of Crimes Act, 1908, and Probation of Offenders Act, 1907. In the case of children death sentence is abolished and in the case of non-capital offences various alternatives are provided. A child (under 14 years) could not be sentenced to imprisonment or penal servitude either as a substantive punishment or in default of payment of fine, etc. Nor can a person between the age of 14 and 16 unless he is of such an unruly character that he cannot be detained in any place of detention provided for children and young persons or of such a depraved character that he is not a fit person to be detained. He may be committed to the care of a relative or other fit person named by the Court; he may be placed under the supervision of probation officers; he may be sent to a reformatory or an industrial school. Instead of other punishments, the Court may simply direct whipping. Young men between 16 and 21 may be sent to Borstal Institutions. There are also special provisions made as to defectives, *i. e.*, idiots, imbeciles, feeble-minded persons, and a new category, moral imbeciles, *i. e.*, persons who display from early age permanent mental defect coupled with strong vicious or criminal propensities on which punishment has no effect. The Court is also given power to postpone sentence requiring the convicted person to enter into recognisances with or without sureties in all cases punishable with imprisonment, if the Court is of opinion that, having regard to the character, antecedents, age, health and mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances under which the offence is committed, such a course is justified. It may in such cases also order payment of compensation. Again, in the case of children and young persons the Court may impose a fine on them instead of other punishments: it may also impose a fine on the guardian. A statute of 1827 conferred power on the Court to add a sentence of solitary confinement to hard labour but this was taken away by 56 and 57 Vic., c. 54. Whipping was one of the ordinary common law punishments for misdemeanor. In 1820, it was made illegal to whip females, and by the Criminal Justice Administration Act no person can now be sentenced to be whipped otherwise than under a statutory enactment. The general power of whipping for felonies given by 7 and 8 Geo. IV, c. 28, was taken away by 51 and 52 Vic., c. 57. At common law a fine was rarely if ever imposed for treason or felony but in the case of mis-

demeanor the Court might impose a fine as a part or whole of a sentence. The only restriction is that imposed by *Magna Carta* against excessive and unreasonable fines. Forfeiture on convictions for treason and felony has been abolished by the Forfeiture Act of 1870.

It was a characteristic feature of the old English Criminal Procedure that it admitted of no appeal properly so called, either upon matters of fact or upon matters of law though there were a certain number of proceedings which partook of the nature of an appeal. There was first the writ of error which was however available only when there was some irregularity apparent on the face of the record. This did not mean much, for the record gave very little information. The only document connected with a trial which had to be in writing was the indictment upon which the officer of the Court makes certain memorandum showing the plea of the prisoner and the verdict of the jury. He also used to keep a minute book in Court in which the names of jurors, abstract of indictments, the memorandum of pleas, verdicts and sentences used to be entered. This was a private memorandum book having no legal authority, but that was the only record kept of criminal cases. If ever it became necessary "to make up the record" it became the foundation of the history of the proceedings set out with pedantic, and useless detail. The record so made up in cases of felony would state "the session of Oyer and Terminer, the commission of the Judges, the presentment by oath of the Grand Jurors by name, the indictment, the process to bring in the offender, the delivery of the indictment into Court, the arrangement of the pleas, the issue, the verdict of the jury, the asking the prisoner why sentence should not be passed on him, and the judgment. The record, it will be found, contained no information as to either evidence or as to the directions given to the jury. The only errors that could be assigned were thus in respect of defects in indictments, sentence or issue or impanelment of jury and naturally it was not a very hopeful kind of process for the accused. Till the third year of Anne, these writs were issued entirely out of favour and were the means by which conviction was set aside when the Crown was so minded. In that year the Court held that in cases of misdemeanor writs ought to be granted as a matter of justice and if the Attorney-General refused to grant his fiat they would direct him to do so if there were good grounds for doing. If granted they would not be contented with the Attorney-General's

admission but would judicially determine the question. In cases of felony and treason, the issue of the writ was always a matter of favour granted on the fiat of the Attorney-General which used to be issued when an arguable point arose and the Court decided the question judicially.

Another method was by motion for a new trial which was available in cases of misdemeanor. In cases where questions of difficulty were apprehended to arise application used to be made to the King's Bench to remove the case to be tried by itself or at the Assizes on the *Nisi Prius* or Civil Side. When a case was so tried, a new trial might be moved on the ground of misdirection, or on the ground that the verdict was against evidence or on any other ground on which new trials could be moved for in civil cases. In *Queen* v. *Scaife*(2) in a case of felony tried before the assizes a similar order was made without argument but the Privy Council declined to follow the precedent as being an unwarranted innovation. Another of the methods was by resort to the Court for Crown Cases reserved. The practice for the Judges was when any point of unusual difficulty arose to reserve the point for the consideration of the other Judges, respiting the execution of the sentence or postponing judgment. The point reserved would be argued before Judges by counsel not in Court but at Sergeant's Inn, of which all the Judges were members. If they thought the ruling was wrong, the accused received a free pardon. This applied only to the Judges of the superior courts. So far as the Quarter Sessions was concerned, no such remedy was open. In 1848 the informal tribunal above referred to was erected into a Court called the Court for Crown Cases reserved consisting of all the Judges, five of them including the Lord Chief Justice forming a quorum. If they differed the matter was referred to the whole body. Under this Act any Judge or Chairman or recorder of a Quarter Sessions might also state a case for the opinion of the Court but it was left to his absolute discretion to do so or not. This Act did not apply to cases removed by *certiorari* and tried before the King's Bench or the Assizes on the *Nisi Prius* or Civil Side. The Judicature Act did not interfere with the procedure. It was provided that no appeal lay from a judgment so arrived at. It also provided that in other cases also, no appeal lay from the Judges in any criminal cause or matter save for some error of law apparent on the face of record. Now a

2. (1852) 18 Q B 773 : 118 E R 292.

comprehensive statute dealing with criminal appeals has been passed in 1907 which has instituted a Court of Criminal Appeal to hear appeals. From the decision of the Court of Criminal Appeal no appeal lies unless the Director of Public Prosecution or the Prosecutor or the defendant obtains the certificate of the Attorney-General that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. Under the former practice no appeal lay to the House of Lords from the Court of the Crown Cases reserved but an appeal lay to the Court of Appeal and the House of Lords from the judgments of the High Court in any criminal matter where error of law appeared on the record.

Appeals lie to the Court of Criminal Appeal in the following cases:

(*i*) From a conviction on an indictment on a point of law.

(*ii*) With the leave of the Court of Criminal Appeal or upon certificate by the trying Judge that it is a fit case for appeal against his conviction on any question of fact, or mixed question of law and fact or any other ground which appears to the Court to be a sufficient ground.

(*iii*) With leave of the Court of Appeal from any sentence. There is no appeal from acquittal. Writs of error and motions for new trial also are abolished by this Act. The Act is made applicable to convictions on crimial information and coroner's inquisitions and also to cases in which a man is dealt with under the Vagrancy Act as an incorrigible rogue. The jurisdiction under the Crown Cases Act is also transferred to this Court.

The Court has to allow the appeal if it is of opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or the judgment of the Court should be set aside on the ground of any error of law or that on any ground there was a miscarriage of justice. The Court may, notwithstanding that there was an error, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. The following are some of the points that usually form the subject of discussion in the Court of Appeal. Defects in indictment are points of law for this purpose but encouragement is not given to such objections unless there is actually a miscarriage of justice in conse-

quence. Wrongful admission of evidence is a good ground for appeal unless the evidence could not reasonably be said to have affected the minds of the jury in arriving at their verdict. Wrongful exclusion of evidence is a ground for setting aside conviction unless the verdict would in all probability have been the same even if the evidence was admitted. Absence of corroboration to accomplice's evidence is considered a good ground for quashing conviction. Misdirection on a point of law is of course a good ground, but misdirection on evidence can be objected to only on leave. If there is misdirection, the conviction will be quashed unless the prosecution can show that even on a right direction the jury would have come to the same conclusion. When it is urged that the verdict is against the weight of evidence, it is necessary to show that the verdict is unreasonable. If the argument is that there was no evidence to go to the jury, a distinction is made between cases where the objection is taken before the defence is entered and where it is taken after the case is over. In the former case, the defence evidence will not be taken account of though it may fill up the gap in the prosecution. This is however doubted. The general grounds of appeal provided for in the Act relate to defects in the constitution of the jury, misconduct of the jury, unfair trial and so forth.

The special pleas that generally occur in criminal trials are four: *Autrefois acquit, Autrefois convict, Autrefois attaint* and pardon, viz., previous acquittal, previous conviction, attainder and pardon. The basis of the first two pleas is the common law rule that a man may not be put twice in peril of the same offence and not any rule of estoppel. A previous acquittal is a bar (*i*) where the acquittal is for the exact offence, (*ii*) where it was in respect of the same act or offence and there is some statute that says that he should not be tried or punished again on the same facts. The first branch applies not only to the same offence but also to such offences of which he could have been properly convicted on the first indictment, for instance an acquittal on a charge of murder is a bar for a subsequent indictment for manslaughter. Attainder for felony and treason has been abolished in 1870 and in effect the plea of attaint according to which a person once attainted of treason or felony could not be indicted for another felony has become obsolete. The theory on which this plea proceeded was that attainder was equivalent to death in the eye of the law and a fresh prosecution in the circumstances was meaningless.

Veneri de novo is the power of summoning a fresh jury which took place in two cases (1) before completion of the trial if the Judge thought fit to discharge the first, (2) where a special verdict has been returned on which the Appellate Court could not enter judgment or where there has been irregularity in the trial amounting to a mis-trial, *e. g.*, cases of defect of jurisdiction in respect of time, place and person or of imperfectly worded or ambiguous or inconsistent verdicts. (3) By a Court of error in cases of mis-trial of treason, felony or misdemeanor. (4) By the Court of Crown Cases reserved when the Court refused to accept the right verdict and on a misdirection, a wrong verdict was accepted, or where the verdict was against evidence.

The Criminal Appeals Act does not affect the discretionary power of Judges of discharging the jury nor does it seem to affect the inherent power of the Appellate Court to direct it in proper cases.

In *Rex* v. *Ball* (3), a question arose as to what is to happen if the House of Lords reverses the judgment of the Court of Appeal acquitting the accused and the Court came to the conclusion that the result was that the conviction was restored and effect was to be given to it by correcting the record, expunging the judgment of acquittal, and by the accused being arrested and made to submit to the sentence.

In this connection, we may also consider a few of the well-known writs largely resorted to in criminal cases although their scope is not restricted to criminal cases. These are the writs of prohibition and *certiorari*.

The writ of *quo warranto* was a writ of criminal nature once but now it is a purely civil one. The writ of prohibition is a prerogative writ issuing out of the High Court of Justice and directed to an inferior Court, which forbids such Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It might be peremptory or it might be *quousque, i. e.*, until the Lower Court alters its decision. The writ though not of course is of right and not discretionary and the superior court cannot refuse to grant the writ on the ground of the smallness of the matter in dispute or delay on the part of the applicant. The writ cannot be claimed of right unless the defect of jurisdiction is clear but it will not be granted if the defect can be cured by an amendment. If the objection to jurisdiction is upon the face of the record, it may be taken at any time, even after judgment. If the point of juris-

3. L R (1911) A C 47.

diction depends on some fact within the knowledge of the applicant the Court will interfere only in exceptional cases after judgment. Prohibition will be granted when the Court on an error of law has given itself jurisdiction but if it has acted upon a wrong decision of facts on conflicting evidence, the Court does not usually interfere. This writ is not raised to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits.

Certiorari issues out of a superior court and is directed to the Judge or other officer of an inferior Court of record requiring that the record of the proceedings should be transmitted to the superior Court to be there dealt with. Indictments are removed from the assizes and from the central criminal court by a writ in the nature of *certiorari* for those Courts are now branches of the High Court itself. In addition to removing indictments to the High Court for trial or for judgment in the case of special verdicts, *certiorari* also lies for questioning the proceedings of inferior Courts or judicial bodies. It is not used for removing after acquittal unless the acquittal is on appeal before an inferior tribunal. It is used to quash orders other than judgments on indictments, or to quash indictments before trial. At common law the sentence of any Criminal Court of inferior jurisdiction can be removed into High Court in aid of the defective coercive powers of the Lower Courts. This power of superintending, supervising, aiding or controlling of the High Court is held to give it the right of protecting also the lower Courts against publications which are likely to prejudice fair trial, and the High Court has power to punish such offences as contempts summarily.

CORRESPONDENCE.

To

THE EDITOR,

MADRAS LAW JOURNAL.

"VAKALATS AND CRIMINAL COURTS".

THERE is a good deal of obscurity as to the authority for the practice of Pleaders filing Vakalatnamas in Criminal Courts. Both the Criminal Procedure Code and the Criminal Rules of Practice do not contain any clear rulings as to what form criminal court vakalats should bear and when vakalats are to be presented before a criminal court. The form usually employed, however, for a vakalat is Form No. 121 of the Civil Rules of Practice and curiously enough it goes unchallenged. The Judge of the Criminal Court is satisfied if the vakalat is

duly attested by the village munsif or the municipal councillor and if in place of the words "plaintiff and defendant" the words "petitioner and counter-petitioner" or "complainant and the accused" are used. Strictly speaking, the form of vakalat prescribed by the Civil Rules of Practice has to be amended in several material particulars before it can suit the exigencies of criminal courts.

The usual practice is for a vakalat being filed by only the pleader for the complainant or the petitioner; though according to Item 10, Sch. II of the Madras Act No. V of 1922 a vakalatnama presented before any criminal court other than a High Court should bear a court-fee stamp of one rupee, it is no where laid down in the Criminal Procedure Code or the Criminal Rules of Practice that a pleader for the complainant or the petitioner should file a vakalat with a court-fee of one rupee. The pleader for the accused accoding to R. 141 of the Criminal Rules of Practice and G. O. No. 918, dated the 16th June, 1910, files only a memorandum of appearance which need not bear any court-fee stamp as in the case of a vakalat. The said R. 141 has the clause "Whenever a pleader........ does not file in court a vakalat from his client" but no where has it been definitely mentioned in the said Criminal Rules of Practice as to when a vakalat has to be filed in court by a pleader. Why should not the procedure with regard to vakalats be expressly and clearly laid down?

According to Ss. 205 and 540-A of the Criminal Procedure Code, the personal attendance of the accused under certain circumstances may be dispensed with by a magistrate and the accused might be permitted to appear by his pleader. But would this permission require the filing of what is ordinarily called a special vakalat? There is no mention of special vakalat or any particular form it should conform to in the said sections of the Criminal Procedure Code or anywhere in the Criminal Rules of Practice. And yet magistrates of criminal courts insist on the pleaders for the accused filing special vakalats when permitting the accused to appear by their pleaders. What is the authority for insistence on a special vakalat, evidently a creature of the unwritten law? If a magistrate hears a criminal case in the absence of the accused, it is a serious illegality vitiating trial and the defect cannot be cured even by S. 537, Criminal Procedure Code. This difficulty has been rightly tided

over by Ss. 205 and 540-A, Criminal Procedure Code, and yet what for is the costly insistence of a special vakalat? Various magistrates impose various restrictions as to the filing of special vakalat in one and the same case. If two or more accused in a case are permitted to appear by their pleader only one special vakalat for them all is enough in the opinion of some magistrates, while others insist on as many special vakalats as there are accused in a case whose absence is to be permitted. If at all special vakalats are sanctioned by the law of the land, why should it not definitely lay down somewhere the procedure thereof instead of leaving it to be determined by the sweet will and pleasure of individual magistrates? According to a ruling in *Emperor* v. *Mussamat Jamul Khatun* (1) S. 205, Criminal Procedure Code, allows the accused to appear by pleader and "such appearance involves the performance of all acts which devolve upon the accused in the course of the trial such as answering the examination by the Court under S. 342 or pleading or refusing to plead to the charge under S. 255". Such being the clear decision, if at all a special vakalat in addition to a memo. of appearance is deemed necessary, the legislature should prescribe a form in consonance with the spirit of the decision *supra* and do away with the present anomalous form of vakalat

Some magistrates insist on the pleaders for the accused filing, in addition to a memo., a special vakalat to enable them to obtain public copies of the documents, depositions etc., of the case. This again is unsupported by any section or ruling in the adjective law of crimes.

I hope and trust that in the interests of the litigant public and the legal practitioners of the moffusil criminal courts, the authorities will be pleased to so amend the Criminal Rules of Practice as to lay down expressly and clearly some rulings regarding the filing of vakalats and obviate the anomalies noted above.

(Signed) G. Satyanarayana Murti, M. A.,
First Grade Pleader and Secretary,
Bar Association, Parlakimedi

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1. (1912) 6 S L R 206 : 19 I C 544 : 14 Cr. L J 272.

SUMMARY OF ENGLISH CASES.

In re MONK : GIFFEN *v.* WEDD, 96 L. J. Ch. 296 (C. A.).

Will—Construction—General charitable intention—Partial application of surplus fund—Residue to be applied cypres and not passing to next-of-kin.

A testator after bequeathing a life interest in his estate to his widow gave certain legacies and conveyed the residuary estate to certain charity trustees and directed them to set apart a certain amount for establishing a 'coal fund', the income to be used for the purchase of coal to be distributed among the poor inhabitants of a parish and the balance to be utilised for making loans to the poor inhabitants of the same parish on certain terms. It appeared that there might be a surplus after making the necessary loans.

Held, reversing a judgment of Tomlin, J., that there was an immediate and effective gift of the whole of the residue for the charity and that the surplus income could be applied *cypres*, the same not having passed to the next-of-kin.

Per Lawrence, L. J.—"There is nothing in law to prevent a testator, if so minded, from setting up a permanent charity, snch as the one here, and from endowing it with a fund sufficiently large to afford relief not only to the present, but also to the future, objects of his bounty...... The testator is the sole judge as to the amount he desires to devote to the object he had in view, and it is not the function of the Court to inquire whether the testator has over-estimated the amount required to carry out his scheme, or whether it is likely or not that, within a reasonable time, so large an amount will be required for that purpose. In order to constitute a partial failure of a charitable trust the next-of-kin would have to prove that it was impossible that the whole sum would ever be required for the purposes of the trust."

MCFARLANE *v.* HUTTON BROTHERS (STEVEDORES), LTD., 96 L. J. K. B. 357 (C. A.).

Workmen's compensation—Accident as the result of internal causes—Workman suffering from heart disease—Sudden death during work—Claim for compensation—Maintainability.

A workman was employed as a stevedore in the afterhold of a ship. He was a regular man, able to do his work but it

appeared he was suffering from a disease of the arteries of the heart. One day while engaged along with others in unloading some iron ore he felt ill because of a heart attack and within half an hour thereafter died. In an action by the widow for compensation,

Held, that the personal injury was caused to the workman by accident, that it arose out of and in the course of employment and that consequently compensation should be awarded to the plaintiff.

Per Lord Hanworthy, M. R.—"A man may suffer an accident and be entitled to recover in respect of the injury caused by the accident within the meaning of the Workmen's Compensation Act although the strain which sets up and puts in motion the cause of his death may arise in the ordinary exercise of his work which he is employed to do and is not of a special or momentary character."

Observations of Lord Macnaghten in *Clover, Clayton & Co. v. Hughes,* (1910) A. C. 242, relied on.

MITCHELL *v.* B. W. NOBLE, LTD., 96 L. J. K. B. 484 (C. A.).

Income-tax—Directors of Company holding office for life—Misconduct of director—Payment of compensation to procure retirement—Business expense or capital expenditure—Income-tax Act, 1918, *Sch. D, Rules applicable to cases I and II, R.* 3.

The Directors of a private company who held office for life considered it necessary for the sake of the good name of the company to get rid of a director who was guilty of misconduct and consequently entered into an agreement with him by which it was agreed that the shares in his name should be assigned to the other directors who were to pay him a large sum as compensation to ensure his retirement. The question arose whether such payment was a deductible item of expenditure or capital payment for purposes of income-tax.

Held, affirming a decision of Rowlatt, J., that the disbursement was "wholly and exclusively paid out or expended for the purposes of the trade" within the meaning of R. 3 of the Rules applicable to cases I and II of Schedule D of the Income-tax Act, 1918, and that the same was a deductible item of expenditure and not a capital payment for purposes of assessment to income-tax.

ROBERTS v. ANGLO-SAXON INSURANCE ASSOCIATION, 96 L. J. K. B. 590 (C. A.).

Insurance—Motor car—"Warranted used only for commercial travelling"—Accident while carrying passengers—Liability of insurers—Award—Error of law as a ground for setting aside.

A motor car insurance policy contained in the schedule particulars of the car followed by these words: "Warranted used only for the following purposes: commercial travelling". The insured car caught fire and was destroyed while engaged in carrying passengers. In a claim on the policy the arbitrator awarded compensation.

Held, by the Court of Appeal, that the loss having occurred while the car was not being used for the purpose of commercial travelling the insurance company was not liable under the policy.

Held, also that there was an error of law appearing on the face of the award in that the arbitrator had stated a wrong construction of the policy and that consequently the award must be set aside.

IN RE. ROPNER SHIPPING CO. AND CLEVES COLLIERIES, 96 L. J. K. B. 654 (C. A.).

Shipping—Charterparty—Demurrage—Ship withdrawn by owners for bunkering during demurrage period—Effect.

In order that demurrage may be claimed by the shipowners they must at least do nothing to prevent the vessel from being available and at the disposal of the charterers for the purpose of completing the loading of the cargo; where demurrage having begun to run and while the cargo had not been entirely loaded, the ship-owners, for their own convenience, shifted the position of the vessel from a position where it was adapted to receive cargo, to a point where it was adapted only to receive the bunker coal and proceeded during a number of days to bunker the vessel rendering it impossible for the charterers to continue the loading of the cargo during that period.

Held, that the charterers were not liable for demurrage for the period from the time the bunkering commenced until it was finished irrespective of whether the ship was actually utilised for that purpose during the whole time.

BLATCHFORD *v.* STADDON AND FOUNDS, 96 L. J. K. B. 608 (H. L.).

Workmen's Compensation Act, 1906, *S.* 8—*Industrial disease—Liability of last employer.*

S. 8 of the Workmen's Compensation Act, provides that where a workman is suffering from an industrial disease and thereby disabled from earning full wages and the disease is due to the nature of the employment in which the workman was employed at any time within twelve months prior to the date of the disablement he shall be entitled to compensation. It also provided that the disease was to be deemed to be due to the nature of the employment unless the certifying surgeon certified or the employer proved the contrary.

The appellant who contracted lead poisoning during his service in the navy worked as a painter from 1920 to 1924 under three persons successively. Seven months after he left off his last employer's service owing to illness he was certified to be suffering from lead poisoning and being unable to earn his wages he sued the respondent his last employer for compenstation.

Held, reversing a decision of the Court of Appeal, that the workman was entitled to recover compensation from his last employer by virtue of S. 8 of the Workmen's Compensation Act.

Per Lord Atkinson:— "It was not necessary for the workman to prove that it was the employment with the last employer which in fact caused his disablement or suspension. It will be sufficient for him to prove that his work with his last employer during the twelve months immediately preceding his disablement was of the same nature and character as the work to which his disease was due."

LORDEN *v.* BROOKE-HITCHING, (1927) 2 K. B. 237 : 96 L. J. K. B. 400.

Landlord and Tenant—Covenant not to use premises for certain purposes—Use of premises for restaurant—Breach of covenant.

One of the covenants in a lease enumerated various trades which were not to be carried on on the demised premises during the term without the permission of the lessor, among those trades being those of ale-house-keeper, beer-house-keeper, tavern-keeper and licensed victualler. The covenant also

provided that the tenant should not carry on any trade or business which should be dangerous or annoying to the owner of the premises or the occupiers in the neighbourhood.

Held, that the use of the premises as a restaurant with a beer and wine on license did not amount to a breach of the covenant.

JEBARA *v.* OTTOMAN BANK, (1927) 2 K. B. 254 (C. A.): 96 L. J. K. B. 581.

Contract—Executory contract—Effect of outbreak of war—Delivery of goods to enemy during war-time—Price of goods paid after war—Risks of exchange, who should bear—Agency of necessity—Treaty of Lausanne, Art. 84.

J, a British subject resident in Manchester, was in the habit of procuring Manchester goods for certain Turkish firms residing in Beyrout, then part of the Turkish Empire. He paid for the goods to the Manchester merchants, drew at sight for the price on the Turkish firms, attached to the bills the bills of lading for the godds and financed himself by obtaining an advance on the documentary bill from the Ottoman Bank whose head-quarters were in Turkey through its branch at Manchester. The latter would then forward the bill to the Beyrout branch who would surrender the documents against payment by the Turkish merchants. The bank having collected used to give *J* a cheque in sterling for the amount of the bill less advances and commissions, the bank and not *J* taking the risks of exchange. Just before the outbreak of the war *J* sent certain goods to Beyrout and though they arrived at the latter place before the war the consignees took delivery and paid the price on the bills only during the war in terms of Turkish currency. At the end of the war the bank proposed to pay *J* sterling for the Turkish currency at the then rate of exchange. *J* sued the bank for wrongful dealing with goods and bills received before the war.

Held, that the original contract between the parties being executory the effect of the war was to dissolve the contract and absolve the parties from further performance of it and that the bank was liable in damages for the wrongful handing over of the goods as a conversion.

Held also that their conduct could not be justified either on the ground of agency of necessity or under Art. 84 of the Treaty of Lausanne.

Doctrine of agency of necessity discussed by Scrutton, L.J.

RADCLIFFE *v.* BUCKWELL, (1927) 2 K. B. 273.

Shipping—Loading of cargo—Regulation as to load line—Breach of, during course of voyage—Offence—Merchant Shipping Act, 1894, *S.* 442 (1).

S. 442 (1) of the Merchant Shipping Act, 1894, makes it an offence on the part of the master of a ship to "allow the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load line". A British ship was loaded with cargo in Finland during fine weather, the centre of the disc not being submerged at the time. Subsequently, however, during the course of the voyage to England the ship went deep and the centre of the disc got submerged owing to sea and rain water getting in.

Held, that the master of the ship was guilty of an offence under S. 442 (1) of the Act.

Per Lord Hewart, C. J.—"It is the duty of a reasonably careful master in all the circumstances to take into consideration at the time of actual loading the likelihood of bad weather and its probable effect on a heavy deck cargo."

Per Shearman, J.—"In my judgment the master of a ship allows her to be so loaded as to submerge the centre of the disc whenever he allows an act of loading which may reasonably be expected to cause that submersion at any time during the voyage and in fact does so."

IMPORTERS COMPANY, LTD. *v.* WESTMINISTER BANK, LTD., (1927) 2 K. B. 297 (C. A.).

Banker and customer—Banker receiving payment on behalf of another Bank—Customer Bank subsequently proved to have no title—Liability of banker—Negligence—Bills of Exchange Act, 1882, *S.* 82.

S. 82 of the Bills of Exchange Act, 1882, provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque.... and the customer has no title.... the banker shall not incur liability to the true owner of the cheque for having received such payment." The onus of bringing a banker within the exception rests with that person and he has to show that he in good faith and without negligence received payment for a customer of a crossed cheque.

It is impossible that a very close and accurate survey of all the circumstances can be expected from the clearing banker who has to go through a very large volume of work.

The appellants drew cheques in favour of the foreign sellers to them of goods and sent the cheques over to their own agent S with instructions to hand the cheques to the foreign sellers. *S* stole the cheques, forged the endorsements and paid the cheques into his own account in the German Bank; and when the cheques came forward they were collected by the respondents for the German Bank.

Held, that the respondents were entitled to plead S. 82 of the Bills of Exchange Act in defence, and that they had been collecting moneys for a customer and were not holders for value.

Held also that if a non-clearing bank regularly employs a clearing bank to clear its cheques the non-clearing bank becomes the "customer" of the clearing bank.

Decision in (1927) 1 K. B. 869 affirmed.

JAMES *v.* BRITISH GENERAL INSURANCE Co., (1927) 2 K. B. 311.

Insurance—Motor car collision—Criminal conduct of insured—Negligence—Liability for damages and costs of repairs—Right to indemnity—Public policy.

Under a policy of insurance underwritten by the defendants the plaintiff was insured in connection with his ownership and driving of a 'Fiat' motor car against a variety of matters including what are known as third party risks of public liability. During the currency of the policy while the plaintiff was driving the insured car a collision took place between it and a motor bicycle as a result of which one passenger was killed and another injured. The plaintiff, who was proved to have been drunk at the time of the accident, besides paying for the repairs to the vehicles and damages to the injured, was convicted of manslaughter and sentenced to imprisonment. The plaintiff brought the action under the insurance policy to recover indemnity in respect of the above mentioned expenses and costs. The defence was raised that the plaintiff was guilty of a crime in respect of the accident and that consequently it was against public policy that he should be indemnified.

Held, that the plaintiff was entitled to recover the money under the policy of insurance.

Per Roche, J.—The circumstances in which public policy is applicable are subject to variation..... The act which brought about the civil and criminal responsibilities in this case was the result of gross or reckless negligence and was not done wilfully or advertently. In such cnrcumstances there is not on the part of the person, who does the act, that degree of criminality which in the doing of a known unlawful act makes it against public policy that the perpetrator should be indemnified in respect of it.

Decision of Bailhache, J., in *Tinline* v. *White Cross Insurance,* (1921) 3 K. B. 327, followed.

JOTTINGS AND CUTTINGS.

The Law Officers and the Glittering Prizes.—When these judicial vacancies occur, it must always be a matter of some anxiety for the law officers to know whether to take or to reject the appointment. Sir Douglas Hogg, of course, has before him a clear vista with the Woolsack at the end; and another vista opens up from the place where he now is, to even higher, if less remunerative, honours.

When Brougham was offered the position of Chief Baron of the Exchequer, he rightly refused it. "It is only *one stage* from the Woolsack", said the Premier when making the offer. "Yes," said Brougham, "but the *horses will then be off.*" He also refused the Mastership of the Rolls, but Sir John Leach accepted it; and it was Leach whose judgments were as swift as Lord Eldon's in the Court of Chancery were slow. Whence came the observation that the Rolls Court was the Court of *Terminer sans oyer,* and Eldon's the Court of *Oyer sans terminer.*

—*The Law Journal,* July, 30, 1927, p. 100.

The Undoing of an Attorney-General.—One of the saddest tales in legal history relates to Sir William Horne, referred to in Prof. Courtney Kenny's "What an Old Reporter Told Me", in the *Law Quarterly.* After a brilliant career at the Bar, his title was clear from the Attorney-Generalship to an equally distinguished future on the Bench. Yet he sank to a mere Mastership in Chancery, where he had to prepare and draw up the decrees of Judges who had been his juniors at the Bar

and should have been his inferiors on the Bench. Small wonder that he cursed, or that his epithets, faithfully taken down, were unreadable in Court.

Conscience, Campbell, and Brougham, severally or collectively, were the causes of this distressing *descensus averni.* Horne had been Attorney-General for about a year. Campbell, the Soliditor-General, greatly desired the Attorney-Generalship. Brougham, the Lord Chancellor, because Horne made a poor showing in the House of Commons, began to scheme for his removal to a more congenial sphere. Thus beset on both sides, Horne was offered a judgeship as Baron of the Exchequer. But he had conscientious scruples against pronouncing sentence of death and, therefore, could not go on circuit or sit in a criminal court. He had a conversation with the Lord Chancellor and came away with the strong impression that things would be so remodelled and rearranged that he would not have to perform these distasteful duties. So he resigned; and thereafter Brougham and Campbell protested, perhaps too much, that no such arrangement had ever been made.

—*The Law Journal,* July 30, 1927, p. 100.

For Preferment's Sake.—Mr. Craig's story of Lord Lyndhurst affords an example of how others kept their conscience well in hand, lest it might mar their fortunes. For Lyndhurst, when Mr. (and later Sergeant) Copley, was an ardent Radical. And it is reported that when the Sergeant was making his masterly speech in the Watson trial, Lord Castlereagh was in Court and heard him. "What a pity", his Lordship wrote on a slip of paper, "that your principles prevent your advancement!" "They don't", wrote Copley, with great promptitude, on the same slip. And it is a matter of history that they didn't.

Lord Chancellor King, in earlier times, furnished another example. Whiston, sadly observing that King had been brought up among dissenters at Exeter, "under a most religious, Christian and learned education", says he fell into a dispute with him one day on the question as to whether it was justifiable to subscribe to articles of faith which one did not believe, for preferment. "Which," says Whiston, "he openly justified, and pleaded for it, that we must not lose our usefulness for scruples". But he admitted he wouldn't allow of such prevarication in Court. "And suppose God Almighty

should behave so in the next world, where are we then?" asked the dismayed Whiston. There was no answer.

—*The Law Journal,* July 30, 1927, p. 100.

Lord Birkenhead on the Law.—The list of Lord Birkenhead's literary output is growing. We have had the *Points of View,* the *Contemporary Personalities,* and the *Fourteen English Judges,* and now in two volumes we have *Law Life and Letters.* We shall not attempt to deal with them in any detail this week, but there are chapters bearing on the administration of the law and on professional matters which will be of great interest to lawyers, and *Milestones of My Life,* in the second volume, will appeal also to a wider circle. In the chapter on *Law and the Public,* in the first volume, Lord Birkenhead lets us into the secret that when he was Lord Chancellor he urged on the Coalition Government the need of Circuit reform. But local political influence was against him. "The task of a Lord Chancellor is very hard when he has all the politicians against him, the majority of the lawyers, and only a minority tepidly with him". If Lord Birkenhead, who put the Law of Property Act through by sheer dæmonic energy, could not shake the archaic circuit system, the case is pretty hopeless. And Lord Birkenhead who, it may be guessed, got "surprising fees" in his time, thinks that the practice of running after fashionable leaders is a mistake. If he became involved in litigation he would select "a competent and industrious lawyer", who would not leave the Court from the moment his case began until the moment it ended. Lord Birkenhead thinks that clients have to thank themselves for the excessive cost of litigation. And the result of a careful consideration of "fusion" is that the fundamental principle must be the advantage of the public, but that while the Bar could hardly resist a unanimous demand by solicitors for equality—needless to say, no such demand now exists—yet the advocate or trial lawyers will always flourish, and the suitable maxim is *Quieta non movere.* We may add that the advocate is only one type of specialist, though it may be the type with which Lord Birkenhead is most familiar.

—*The Law Journal,* October 1, 1927, p. 206.

The value of Juries:—Lord Hewart has been expressing his views also on the use of juries. This was to representatives of the Press at Manchester, who attempted to get his opinion about Mr. Pickles' proposal for professional jurymen. We

gather that Lord Hewart was shy of dealing with the matter unless it was brought forward as the deliberate proposal of the Law Society and of that there is no prospect; but he gave a very laudatory account of the value of juries as now constituted. He quoted Lord Sterndale as saying that juries as juries were never wrong, and Lord Hewart represented this as a serious statement, meaning, however, not that the conclusion of facts was never open to correction, but that on the facts as put before the jury, the conclusion reached corresponded strictly with the weight of the evidence. This, no doubt requires modification, but Lord Birkenhead, in his recent book, "Law, Life, and Politics", speaks in the same strain. "I cannot remember", he says (I, 255), "in the thousands of cases which I supposes I must have argued before juries, more than three in which I was absolutely certain that the juries were completely wrong". And he considers that what twelve ordinary men think of the facts is, on the whole, more likely to be right than a very highly instructed legal functionary. And yet it is well known that juries are more easily swayed by oratorical effort than the highly instructed legal functionary—that is, a Judge—and we imagine that there are not a few cases on record where juries have given surprising verdicts. Still, the views of the late Lord Sterndale, of Lord Birkenhead, and of Lord Hewart, strongly approve what is, perhaps, our most characteristic English institution. In Italy, we notice, there is a prospect of the jury being abolished. Juries have, it seems, shown a certain amount of independence. Of course. That is what they are for.

—*The Law Journal*, October 8, 1927, p. 227.

The Husband's Lost Right to Chastise:—An unfortunate husband who in a police court recently declared in self-defence that he thought he had the right to beat his wife, if he did not hit her too hard was rather out of date than erroneous in his law. For in Mathew Bacon's "New Abridgement of the Law," to which the industrious student still flies for fundamental legal truths, the law is thus stated: "The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in such case if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by suing a writ of 'supplicavit'

out of Chancery; or may apply to the Spiritual Court for a divorce 'propter sævitiam' ".

A hopeful member of the Bar once cited this before the late Lard Halsbury. "Such quaint and absurd dicta", said he, " as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not now capable of being cited as authorities in this or any civilised country". And a dictum of Grantham, J., in a later case, that "it would have served her right if her husband had boxed her ears, for her conduct was enough to drive any man out of his mind", has not been followed or approved.

—*The Law Journal*, October 8, 1927, p. 246.

The Pay of a Lord Justice of Appeal:—The vacancy in the Court of Appeal has not only aroused speculation as to the person upon whom the Prime Minister's choice will fall for the succession, but renewed wonder as to why a Lord Justice should receive no more remuneration than an ordinary *puisne*. When an ex-pupil offered his congratulations to Sir A. L. Smith on his elevation to the Court of Appeal, the promoted one succinctly replied, "No more wages, you 'know'". The responsibility for this state of things rests with a bye-gone generation, foolish and perverse, who deliberately preferred the honour to lucre. When the office was first created, those who were about to be appointed were offered two alternatives—an extra 500*l*. a year or membership of the Privy Council, and in an unguarded moment they selected the Privy Council. Whereof succeeding generations of appellant Judges have been duly sworn and have no doubt wished their predecessors had made a wiser choice.

The rash resolve of the original Lords Justices was sustained in S. 13 of the Judicature Act, of 1873 which allotted to "each of the ordinary Judges of the Court of Appeal and to each of the other Judges of the High Court of Justice, the sum of five thousand pounds a year"———a provision which was duly transferred to and incorporated in the latest Act.

—*The Law Journal*, October 8, 1927, p. 246.

BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS ACT, by Messrs. K. Bhashyam and Adiga. Published by Messrs. Butterworth & Co., 1927. Price Rs. 12-8-0.

Messrs. Bhashyam and Adiga's work on the Law of Negotiable Instruments in India has already taken the fore-

most place among the commentaries on the Act. The subject being one of a growing interest, the appearance of this edition, though after a short interval of the last work, has to be welcomed. There have been only two amendments of the Act since the publication of the last edition and they have been duly noticed in the body of the book. One of the most important decisions on the subject given by the Privy Council from the High Court of Calcutta in *M. A. Sassoon & Sons, Ltd.* v. *International Banking Corporation* is more than of interest to India and has therefore appeared also in the English Law Reports, 1927 A. C. 711. But that decision appeared after the printing of the work under review and could not therefore be noticed in the body of the work. When the problems of currency in this country and measures calculated to popularise banking and to increase the facilities for the same are being considered, it is only appropriate that the learned authors should have thought to bring out the present edition on a closely allied branch of the law. It is needless to add that the case-law has been brought up to date and the notes have been in some places re-written with reference to the latest exposition of law. We believe the volume under review fully maintains the high standard set up by the previous edition of the work.

THE LAW OF CHITTIES, by A. M. Mathew, Vakil, Quilon. Price Rs. 4.

The law relating to chit funds has in recent years come up very frequently before the Madras High Court and chit transactions are so common in Malabar, Travancore and Cochin that it was thought fit to enact the law on the subject in Travancore and the matter is engaging the attention of the Cochin Government. Even in Madras the need for legislation has been felt. On a matter of such interest where there are numerous decisions of the Travancore High Court and the Cochin Chief Court, and also of the Madras High Court, we think the learned author was justified in bringing out this small work setting forth clearly the principles of the law relating to chit transactions and examining the decisions under the various heads. The work consists of two parts, the first dealing with the principles of the law on the subject and the decisions on the same, and the second part gives the Travancore Chitties Regulations of Travancore with a commentary thereon. The appendices which are eight in number give all the allied information and practical hints.

We therefore welcome this publication and believe that it will be found useful for the clear understanding of the law relating to the chit transactions.

A MANUAL OF LAW TERMS AND PHRASES, by Mr. K. Jagadisa Aiyar, B. A., 1st Grade Pleader, Ponneri. Published by the Eastern Law House, Calcutta, 1927. Price Rs. 5.

This publication collects the terms and phrases of Indian and English law and expressions used in commercial and revenue law and arranges them alphabetically giving definitions and explanations adequate for their understanding in use. In some instances references are given to statutes and to standard works. Even as it is, the work is likely to be found of great use. Its usefulness would have been considerably enhanced if the definitions had been taken from the judicial expositions of the same in most cases and references had been given to the decisions themselves on the plan adopted in Strouds' Judicial Dictionary. The expositions of the author would then derive greater authority by such references to decisions. We are aware that the labour involved in producing a work of this character would be very great and the author would be placing the legal profession under a deep debt of gratitude if he added this feature to the work. The appendices to the work give foreign legal words and maxims with their meanings. We have no doubt that the work will be found useful to students and lawyers, judges, magistrates and revenue officials.

THE TRIAL OF GANGARAM AND SEW PRASAD. Edited by the Hon'ble Mr. Justice Page of the High Court of Calcutta and assisted by Mr. B. M. Sen, Barrister-at-Law. Published by Messrs. Thacker, Spink & Co., 1927.

The publication of Notable Trials is of considerable value from the point of view of the lawyer and layman alike. Several works of this kind of English trials have appeared in the Notable Trials Series. There have been many trials in this country which have aroused considerable interest not merely from the sensational point of view but from the point of view of the lawyer and Judge. We wish that more numerous publications of this kind appear in the future and it is a matter for sincere gratification that the Hon'ble Mr. Justice Page found time to edit this work in the midst of his onerous duties and indeed there can be none more competent to edit it.